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# The Wiretapping- Eavesdropping Problem: A Private Investigator's View

Harold K. Lipset\*

Samuel Dash's careful and objective study<sup>1</sup> of practices and techniques of overhearing and recording conversations fills a genuine need. In this area particularly, it is beneficial to the professional and the layman alike to separate fact from legend. The book should serve a useful purpose in allaying idle fears of the almost supernatural, and at the same time disclosing a need for correcting the real abuses in the use of recording equipment.

Wiretapping and other types of electronic eavesdropping have long been scorned as trespasses on the sanctity of people's private lives. And this scorn has become aggravated with the major ideological conflicts of the past half century between democracy and totalitarianism, for the extreme invasion of privacy potentially inherent in eavesdropping has often characterized the latter type of government. Consequently, the presumption, so to speak, among public opinion, legislators, and judges alike has seemed to be against the legality of any kind of tapping and the use of evidence obtained in that way. Therefore, anyone who wishes to utilize these effective detection devices—law enforcers and private citizens alike—must justify his use.

Currently, there is rather heated controversy over whether law enforcers should be able to wiretap and eavesdrop in detecting certain serious crimes and with certain restrictive safeguards. However, virtually everybody seems to be opposed to eavesdropping by private detectives—except private detectives themselves. Even such an ardent proponent of law enforcement wiretapping as District Attorney Edward S. Silver of Kings County, New York has vehemently derided private tapping:

I would make every possible restriction that anybody can conceive against private people tapping. I would be glad to sit with any committee to help

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\* Private Investigator, San Francisco, California. The author wishes to acknowledge his associate and engineer, Ralph H. Bertsche, for writing Part II of this Article.

1. DASH, KNOWLTON & SCHWARTZ, *THE EAVESDROPPERS* (1959) [hereinafter cited as DASH].

draw such laws. I am sure the district attorneys, State and national, would like to sit down with the committee and try to frame legislation to make the use of wiretapping by the private individuals a serious offense, as serious as you do make or dare make it in a statute. . . .<sup>2</sup>

However, such views of private eavesdropping are based on the assumption that all private eavesdropping involves mere "snooping" for purely personal gain unaccompanied by any socially useful purpose. Such a view is demonstrably false.

I am a professional investigator who uses recorders almost daily in my work, but I am as concerned with civil liberties and the right of privacy as any other citizen. However, I must admit that the whole subject has become somewhat subjective with me in the light of editorial and political approaches which have gotten somewhat carried away in the attack on the "foul and evil" practices of tapping and bugging, and which have completely overlooked or ignored the private investigator's point of view. For example, consider a recent editorial in the St. Louis Post-Dispatch which commented on my testimony before the United States Senate Subcommittee on Constitutional Rights:

#### The "Right" to Snoop

Since he is in the "private-eye" business which leans heavily on tapping telephone lines and planting secret microphones, it was natural enough for a San Franciscan named Harold Lipset to tell the Hennings Committee that anybody who uses a telephone does so at his own risk and, in effect, that anyone who engages in conversation surrenders his right of privacy to anyone else who may manage to overhear what he says.

This probably is sound legal doctrine in any police state where Big Brother makes it his business to know everything lest anything endanger his boss rule. But neither the United States nor any of the sovereign states have yet gone totalitarian. They still are devoted to the notion of the Founding Fathers that a man's house is his castle and that his affairs are his own business—at least so long as no court has issued a writ for their investigation.

No "private eye" rings a man's door-bell and claims the right to tap his phone or to plant a recording machine. So even Mr. Lipset may have doubts about what he says. He should know that eavesdropping is a furtive, dirty business against which honorable men instinctively revolt. No doubt there is money in stealing other people's secrets—and listening to perhaps thousands of personal conversations to do so—but it is not nice money, nor is it legal money.<sup>3</sup>

That there is "another side" to this appalling story, as to most others, may be seen from a recent experience of mine. On January 30 of this year, at the request of a prominent Philadelphia attorney, I interviewed a man in his own front yard. However, the man called

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2. *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess., pt. 3, at 563 (1959).

3. St. Louis Post-Dispatch, Jan. 18, 1960, p. . . , col. . .

the police and had me arrested, later swearing in court that I had offered him a bribe and that my companion had threatened him. Consider what would have been my plight had I been without my hidden recorder? Instead this man is now charged with false swearing, a charge similar to perjury.

Commenting on *The Eavesdroppers* presents many problems, and Dash's description of the subject of his study illuminates a major difficulty. Dash says he has used the word "eavesdropping" as shorthand for the more accurate definition of his inquiry: "surreptitious fact-collecting affecting individual privacy."<sup>4</sup> Although Dash says he has "stripped" either phrase of "unpleasant connotations," plainly even he does not believe that objective has been or can be accomplished.

The blunt truth is that, referred to by either name, the practice suggests invasion of privacy *prima facie* distasteful to the American people. But it is equally true that, even throughout Dash's excellent book, repeated examples are furnished of uses of recording devices that turned out to be socially valuable, in that they established innocence against a burden of circumstantial evidence or developed the facts and the truth which were at least partially unavailable through conventional sources.<sup>5</sup>

#### 4. DASH 7.

5. Examples of socially useful private wiretapping and eavesdropping revealed by Dash in his book, although possibly unwittingly, are the following:

Two department stores in Los Angeles have installed closed-circuit television to spy upon shoplifters and pilfering employees. Two large food markets similarly employ closed-circuit television on a balcony, behind two-way mirrors, for the purpose of maintaining a surveillance over the food counters.

#### DASH 212.

Some of the large department stores and industrial plants in Chicago use . . . wiretapping for intercepting calls made by their employees, in order to check on security leaks, thefts, or employee courtesy and efficiency. . . .

Some department stores have placed a constant tap on the pay stations within their building for security reasons.

*Id.* at 226.

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A suit was filed for \$50,000 against a cab company for damages based on personal injuries. The cab company requested that technical surveillance be placed on the . . . plaintiff's . . . room. . . .

While waiting for the case to be brought to trial, subject changed to four different rooms — each one for a twenty-four hour period. As a result of this technical surveillance, it was proved in court that subject's claim was illegitimate and the cab company won the case.

*Id.* at 228-29.

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One private detective agency was employed by a bakery concern to see if it could solve a serious case of pilfering. The officers of the bakery suspected that a platform man was receiving pay-offs from drivers for giving them merchandise in excess of their invoices. The private detective agency placed an undercover agent in one of the company's plants in the guise of an employee. This agent carried a Minifon on his person during the entire case and recorded conversations with various employees. He finally was able to become friendly

## I. RESTRICTED WIRETAPPING

It is manifest that here, as in so many other fields of the law, some balancing of conflicting interests is required. While Dash's book, limited as it is to an examination of actual practices or equipment, takes no policy position, inevitably its impact is to pose the broad question:

Can the substantial advantages of recorded conversations, secretly taken, be reconciled with constitutional guarantees which essentially do not differ from American notions of fair play?

I think so. By using recording equipment only in *restricted situations* one ought to be able to realize its benefits without infringing upon priceless civil liberties. The remainder of Part I of this Article is a brief account of how this concept has been put to actual use in my investigative work with modern electronic equipment.

Typical of the types of cases a private investigator handles are the following:

Business organizations hire investigative assistance to resolve various problems, including thefts by employees of merchandise, cash, or trade secrets; thefts by outside individuals; public response to new products; and training of sales personnel.

Insurance companies seek to have the validity of claims of loss ascertained.

Law enforcement agencies request special assistance on internal problems, such as investigative work necessary to apprehend police officers engaged in illegal activities. The police department often finds it advantageous to retain outside assistance rather than use other officers to make the investigation.

Trade unions often encounter problems comparable to business organizations.

Attorneys retain investigators to aid in the preparation of personal injury, domestic relations, criminal defense, and commercial litigation.

In all cases, the investigator's task is to ascertain the true facts and present them to his clients. In the course of this work, his techniques include interviewing witnesses, taking photographs, conducting surveillances, recording conversations, protecting persons and property, doing undercover work, checking backgrounds of persons, checking public records, and preparing extensive written reports.

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with the shop steward in the plant, who turned out to be the guilty party. The recordings were played for the union's business agent, who in turn confronted the shop steward with the evidence and forced his resignation.

*Id.* at 263.

The use of recording equipment is of undoubted value to efficient and effective investigation. In fact, often it is absolutely necessary. Mr. Robert LaBorde, a private investigator in New York where private wiretapping is prohibited, has characterized the consequences well:

A lot of leg work, . . . a lot of tedious work, standing around on street corners, observing, following, using binoculars . . . climbing up out of roofs, appearing in windows, peeping through keyholes, getting information from discarded paper and it was pretty difficult for us to operate without electronic equipment. Today electronic equipment, if we were able to use it, would facilitate a private detective's work tremendously. In many instances where we could use equipment to advantage, it would be helpful to our clients' interests. . . . Today it might take us a month to ascertain what it would have taken two or three days to ascertain with the use of electronic equipment.<sup>6</sup>

Moreover, the use of recording equipment as one of the tools of the investigative trade is no different in principle from the use of a camera or a lie detector. Let me first define the areas of recording which I consider legitimate, because, all tools being susceptible to misuse, a generalization leads to misunderstandings. Recordings for purposes of investigation are described in the vernacular as "bugging" and "wiretapping." Bugging refers to the recording of two or more persons in a face to face conversation. Wiretapping refers to the recording of a telephone conversation. I contend that both are proper under either of the following circumstances: a) the person making or authorizing the recording is a party to the conversation, or b) the conversation is taking place on premises which are under the recording party's control, such as his office or home.

Other than in these limited situations, I do not approve of wiretapping or bugging either by private citizens or law enforcement agencies. However, I feel strongly that in the situations described above a private citizen's right to record should be protected from any encroachment, because recording under such circumstances affords a measure of self-protection to the party directing the recording and still preserves the constitutional liberties of the individuals whose statements are recorded.<sup>7</sup>

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6. Transcript of *The Big Ear*, Presented on "NBC Kaleidoscope," March 22, 1959, p. 6.

7. Even a prominent legislative committee investigating wiretapping has conceded that there should be a difference in legal consequences between the situation where the conversation is recorded without the knowledge of either participant and the situation where the person making or authorizing the recording is a party to the conversation. Report of the New York Joint Legislative Commission to Study Illegal Interception of Communications (1956), reprinted in *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., pt. 2, at 285 (1958). The language of the committee was as follows:

We submit that a specific wrong is committed by the man who secretly listens or overhears a conversation to which he is not a party; a quite different act is

*The Eavesdroppers* discloses many instances of *illegal* wiretapping<sup>8</sup> and bugging. I make no attempt to defend or justify such acts, either on grounds of public welfare or personal gain. If a competent investigator cannot accomplish his job without breaking laws, he might just as well revert to the rack. I aim to justify the investigatory use of modern recording equipment only *within the limits* outlined in this Article.

Experience has proven that people too often lie. Furthermore, they frequently do not wish to become "involved" and often have personal and emotional problems which may limit the accuracy and completeness of their testimony. Experience has also demonstrated to our clients that a detective, using proper investigative techniques, can overhear a potential witness talk under circumstances much more favorably conducive to his telling the truth than are the confines of a courtroom. The actual conversation can thereby be preserved by means of a recording and the record is a faithful and true reproduction of what was said, accurate even to the extent of indicating the tone of voice used. Voice inflections give interpretation and meaning to spoken words that often are not reflected in print or mere recollection. Anger, contempt, hesitation, and surprise are but a few responses that are proof of this. For instance, consider this hypothetical:

A police officer rounds the corner after hearing a shot fired and finds X standing over Y's body with a smoking gun in his hand. X may have arrived just before the police officer and picked up the gun by reflex action, or X may have grappled with the killer and taken the gun away from him. The police officer grabs X and says, "You killed Y." X replies, "I . . . killed Y?" X's reply would contain at least surprise, shock, indignation, or question. However, the police officer, when on the witness stand and asked by the prosecuting attorney, "What were X's exact words?" could honestly reply, "He stated to me, 'I killed Y.'"

Moreover, unlike a person's testimony in court, a recording is not made inherently questionable by the limiting human factors of bias, prejudice, accuracy, intelligence, reliability, memory, or interpretation.

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committed by a man who makes or authorizes a secret recording of a conversation to which he is a party. To make such a secret recording may be repulsive, unethical, or immoral; we have been urged to propose legislation against it. But any such legislation, if it is proposed, should distinguish between this act and the act of . . . secretly listening.

8. By *illegal* wiretapping, I refer to any act of listening to a telephone conversation without the consent either of one of the talking parties or of the subscriber of the telephone, or without the approval of a court order (in jurisdictions where court-authorized tapping is permitted). For some examples of illegal wiretapping, see DASH 79-95, 216, 218, & 227.

The basic question as to whether recordings should be permitted under the limited circumstances proposed is whether or not any rights of the individual *not informed* of the recording are being violated. I maintain that no *legal rights* are violated and, further, that the possible violation of any *moral rights* is outweighed by the greater moral good of arriving at the truth. Two people who engage in a conversation surrender, at least to each other, the right of privacy to that conversation. Either party has the right to testify to that conversation in any court in any state. Any third party with a right to be on the premises also can testify to that conversation. A conversation, in fact, is similar to a letter. Once a letter has been received, no one can question the right of the recipient to show the letter to whomever he chooses; by doing so, he certainly is not violating any right of the sender.

This same point applies to a telephone conversation between two parties. The questionable area is in recording telephone conversations to which one is not a party but which are carried on over his telephone. The pertinent inquiry is whether anyone has a right to use *another person's* telephone for *his own* personal business or to commit an illegal act. In the State of California, under Public Utility Commission regulations, the telephone company furnishing facilities must not knowingly permit these facilities to be used for illegal purposes.<sup>9</sup> The telephone company monitors its facilities to be certain of this. It seems perfectly logical that a private individual, using and paying for these same facilities, should have the same right to protect himself against a person's using his, the subscriber's, telephone for illegal purposes.<sup>10</sup> Moreover, even in many instances where the telephone is being used only for personal business, overhearing would seem to be justified. For example, an employee's private conversations during working hours should be subject to overhearing, when the employer's purpose in making the recording is merely in the nature of a survey to ascertain whether such time wasting was occurring.

An investigation of the use of recordings with the restrictions outlined will not uncover one single act of deprivation of anyone's constitutional rights. Any recording which does so deprive will be found to have taken place outside of these areas and is already covered by existing statutes which make criminal some act neces-

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9. See 47 Cal. P.U.C. 853 (1948) (illegal use of telephone facilities).

10. An interesting side issue that parallels this problem concerns surreptitious photography, which is well accepted as a means for proving fraudulent claims of personal injury. In a moral sense, the cameraman may be trespassing or invading the privacy of an individual when, for example, he photographs him mowing the grass in his own backyard. I wonder whether the writer of the editorial in the St. Louis Post-Dispatch would make a distinction between recording on tape and recording on film.



sarily committed in the course of making such a recording, such as trespass or breaking and entering.

Assuming that no rights of the person not informed about the recording are impaired, the reasons for allowing restricted recording become compelling. For the use of modern recording equipment is probably the greatest recent advance toward assuring ascertainment of the truth, which of course is the most important feature of all litigation, either civil or criminal. Moreover, because of their high credibility, recordings often preserve important rights of the person requesting that they be made. Actual cases that our office has handled where recordings of face-to-face conversations were important to the preservation of an individual's rights are as follows:

CASE NO. 842: The client was accused of purchasing stolen fountain pens. Prior to commencement of the trial, the man who referred the seller of the pens to our client was engaged in conversation. He defended the right of our client to purchase this merchandise and stated that our client had not known they were stolen property. At the trial this man testified for the prosecution as the main witness and stated he had informed the client of the fact that the pens were stolen. The recorded conversation of this witness and the investigator was played to the judge and jury. The client was acquitted.<sup>11</sup>

CASE NO. 4074: A man was charged with the operation of a motor vehicle while under the influence of alcohol. He had been involved in a minor collision late at night. The following day, at the request of his attorney, we interviewed the other party involved, a woman. She said she had never been close enough to the client to smell his breath, and that she based her opinion of his lack of sobriety on his gait and speech. Prior to the client's trial but subsequent to the interview with her, she filed a civil claim for damages. At the criminal trial, she testified that the client's breath was overpowering. As is frequently the case, the investigator's testimony, as a professional man retained by one side, was attacked. It was only by the production of the recording to corroborate the investigators' testimony that the client was acquitted. Let us add that the client's peculiarities were due to the fact that he had a wooden leg and a speech impediment.

CASE NO. 8256: A representative of a foreign government was exercising his dislike of a salesman of one of his country's products by advising people going abroad not to rent or buy that particular brand of product, and he expressed a preference for

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11. Dash discusses this example of socially useful private eavesdropping at page 214 of his book.

another brand. A recording of this advice to a prospective visitor to his country led to his recall.

CASE NO. 3064: In a divorce case, the wife stated that her husband was an attorney and was friendly with all the judges and attorneys in the area. She stated that she had only his statements to her as evidence to present and that he had advised he would falsify evidence against her. Recordings of conversations between this woman and her husband were made and they supported her version of the facts. She obtained not only a divorce but an equitable division of the property.

CASE NO. 7325: A client complained of being overcharged interest by a pawn shop. These shops made a practice of accepting only cash and refusing to give receipts. A recording of a conversation with the pawn shop operator was instrumental in obtaining a reduction to the legal rate of interest for the client and some changes in this practice by the pawn shops.

CASE NO. 1423: A man purchased a used truck from a large auto dealer. This truck was warranted to have a new engine. After the client had a great many problems with this engine and was given no satisfaction by the dealer, we arranged for him to wear a recording machine for a final conference. Again no adjustment was arrived at but admissions were made by the dealer. This recording was played in court after four employees of the dealer had testified on his behalf. The recording was the only corroboration for the client. The client received a judgment.

CASE NO., 891: A tenant in a housing project reported to a trucking firm that she believed a neighbor, employed by this firm, was selling merchandise stolen from trucks. Not wishing to accuse employees without proof, the trucking firm retained our agency. A recording of the neighbor being offered merchandise at very low prices served to corroborate our sole witness. This was the basis for uncovering a large theft ring.

CASE. NO. 1714: A pregnant woman retained our services prior to filing a paternity action. Recordings obtained admissions from Mr. X that he was the father. Subsequently, he denied making such statements, but the recording corroborated the testimony of the client. She was awarded child support.

CASE NO. 8626: A law enforcement official was approached by an individual and asked to dismiss pending charges against him. This official was threatened with exposure of illegal acts he had allegedly committed. The extortioner was wary of recordings and went to extreme efforts to arrange a meeting where he felt safe in making his demands. Nevertheless, we were able to make a recording by the use of a small radio trans-

mitter. The conversation contained admissions by the extortioner that he had arranged to frame the official and would make public his allegations through a third party if the charges against him were not dismissed. He pointed out to the official that publicizing these allegations would ruin him, even though they were untrue. He dared the official to arrest him without corroboration on the charge of blackmail. The arrest was made.

CASE NO. 1935: In this case the client was a union representing auto salesmen. Their contract provided that on all sales made by company executives above a limited number, commissions were to be divided among all salesmen. The union officials believed that a professional athlete, on the payroll as a salesman, was not selling and that commissions rightfully belonging to the salesmen were being diverted to the athlete's credit. The technique employed was to conduct a survey of automobile purchasers. For corroboration, a percentage of the interviews were recorded. We had to prove that these purchasers never met, dealt with, or knew of the existence of the athlete in connection with their purchase. We did not openly begin our interview with a straightforward approach because our experience has been that people do not cooperate for fear of becoming involved. This matter was brought to arbitration, and the salesmen received the money due them.

CASE NO. 8795: Our most recent case is quite pertinent since I was arrested and charged with offering a bribe and making threats in an interview with a dissident member of a union. Fortunately, this interview was recorded and the accuser is now, himself, charged with false swearing.

There are certain common types of fact situations of which we have had numerous cases. For example, many storeowners who lease space on a percentage-of-sales basis often suspect the lessees of not reporting all sales. We have had a number of cases where the investigator has made purchases totaling to odd amounts. Subsequent investigation through accounting procedures failed to reveal some of the investigator's purchases. Again, the recording has corroborated our other investigative efforts.

In civil damage cases, we often record our interviews with witnesses so that the attorney can hear and evaluate the witnesses and his case prior to going to trial. It is especially advisable to record interviews with hostile witnesses such as, in a personal injury suit, the passengers in the defendant's car. Our experience in the investigative field leads us to believe that a more extensive use of recordings would substantially decrease the amount of perjury committed.

Attorneys frequently engage our services to record their inter-

views with dubious clients and witnesses. Many have a permanent installation in their office to use at will. This phase of electronic business has increased rapidly since a local attorney was accused of a crime based upon the allegations of a client that the lawyer insisted the client commit perjury.

The following are some of the cases on which we have worked where recordings of telephone conversations have proven socially useful:

CASE NO. 8457: A business organization received letters threatening to expose its method of obtaining lists of prospective customers. These letters were written in such a manner that they purported to be business offers. We arranged for their incoming telephone calls to be recorded. The extortioner was not as adept in the telephone conversations as he had been in his letters. His true purpose was revealed and, based on this recording, police were called in and the extortioner arrested as he accepted the money he had demanded.

CASE NO. 1948: The owner of a chain of drug stores rewarded a successful manager of one of his stores by giving him an interest in a new store in the chain. Sometime later the owner noticed a phenomenal growth of business in the new store and a substantial loss of business in the old store. Outside investigation was not productive. Arrangements were made to monitor the store's telephones, and the pattern of transferring prescription business from the old store to the new store became readily apparent.

CASE NO. 2122: A client complained numerous times to police and telephone officials about obscene and crank calls she was receiving. Her complaints were not acted upon by the police and she was told by telephone officials that they could assist her only by changing her telephone number. We arranged to record the next conversation and when this was played to the police, my client obtained the desired action—employment of a daily monitor and tracer on the line, which eventually resulted in determination and capture of the party making the calls.

CASE NO. 7836: The owner of a chain of large furniture stores retained our agency to investigate alleged inventory shortages. One of our techniques was to record telephone calls. We did not detect any evidence of theft, but we did uncover a large bookmaking ring within the chain of stores. This client's premises were being used for an illegal activity without his knowledge. If it had been discovered first by the police, the client would have had a difficult time proving he was not personally involved. In addition, his telephone service would have been

discontinued, and he would have suffered a large loss of business.

CASE NO. 4023: Parents of a teenage boy found evidence which led them to believe that their son was using narcotics. However, the boy denied this and refused to name his associates. He became estranged and threatened to leave home. Monitoring and recording telephone conversations at this home produced evidence that the parents' fears were justified. The police department was notified, and its subsequent investigation led to the apprehension of a narcotics ring. The same set of facts and procedures also led to the exposure of a high school prostitution racket. Case No. 3349.

CASE NO. 4457: A contracting firm found it was being regularly underbid by a very few dollars by a competing firm. Recordings of this client's telephone calls produced proof that one of the estimators was calling the competing firm and revealing his firm's bids.

CASE NO. 3097: A client complained that his wife had requested a divorce and that he could not understand why. Outside investigation revealed nothing. Arrangements were made to record telephone conversations at his home, and we were able to learn that his wife had had a long affair with our client's best friend, and that they were carefully awaiting the divorce before seeing each other again. The wife's boyfriend referred the client to his attorney and then told the wife that he had taken the husband to a lawyer who could not possibly win the case for her husband.

In many of these cases, it is important to note that recordings were used to *corroborate* the facts previously adduced by the investigator. This does not represent illegal or even immoral invasions of individuals' rights to privacy by means of the supernatural. This is merely the expeditious use of new devices given to people by progress. In fact, I am so convinced of the value of this corroboration that I feel *no* individual today should be subjected to criminal trial and possible imprisonment upon the unsupported word of a law enforcement officer alone. *If* the defendant made an incriminating statement, it can *always* be supported by a recording.<sup>12</sup>

Another forward step in the protection and safeguarding of rights would be to insist that all formal hearings be preserved on tape as well as by shorthand or stenotype. For example, the famous—by now infamous—case of Caryl Chessman here in California might

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12. Actually, in both civil and criminal cases, recordings of pretrial statements are no longer secret even before trial. It is the law in California and several other jurisdictions that such recordings of witnesses and even of the defendant himself must be made available to the opposing side.

have been disposed of long ago if the testimony had been so preserved. One of the chief contentions of Chessman has arisen from the fact that the original court stenographer died prior to transcribing his shorthand notes; he asserts that the transcript prepared by the succeeding stenographer was inaccurate and has thereby prejudiced him.<sup>13</sup>

Not only formal hearings but all contractual agreements should be recorded. A substantial amount of wasted litigation merely concerns the validity of fine print in contracts and the interpretation of vague, ambiguous, or equivocal language in various documents. The most credible and conclusive proof of whether or not all parties understood each paragraph of a contract would best be provided by a recording.<sup>14</sup>

It is high time that so-called proponents of constitutional rights realized that one of the greatest protections of these rights is ascertainment of the true facts. Often, this can be accomplished with assurance only by the use of modern electronic recording equipment.

## II MODERN RECORDING EQUIPMENT

The introduction to Part II of *The Eavesdroppers*, entitled "The Tools"<sup>15</sup> reduces the entire practice of listening and recording by investigators to its essence. The quality of any recording is dependent upon the proximity of the microphone to the persons speaking, the use of equipment best suited to the particular situation involved, and the extraneous noise level in the surrounding area. Probably the most difficult job facing the recording technician is not the accomplishment of the assignment but explaining to his superiors or clients why the surreptitiously made recording does not sound as clear as last night's TV or radio program!

As Dr. Richard Schwartz, who wrote Part II of *The Eavesdroppers*, points out, there is nothing mysterious about the equipment itself or the methods employed.<sup>16</sup> The application of electronic and electromechanical devices to the field of investigation is merely the natural outgrowth of technological advancement, and the investigative use of such equipment is not new. There is, of course, a great

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13. For a thorough treatment of the legal issues involved in the Chessman marathon, see Note, *The Caryl Chessman Case: A Legal Analysis*, 44 Minn. L. Rev. 941 (1960).

14. The recording should contain admissions of all signatures to the contract. Each paragraph should be read aloud and all of the parties signifying their acceptances by reply. Any particular paragraph that might be unclear could be questioned by any party and replied to by another party. The entire record could be identified by a notary public. Of course, it would be too unwieldy to record all negotiations; the main purpose would be accomplished by recording the final contract.

15. DASH 303-79.

16. *Id.* at 305.

difference between the equipment of today and that of thirty or more years ago, but the underlying principles and applications remain the same.

Basically, the equipment available to and used by private investigators and law enforcement officials is the same as that used by any other group whose objective is the recording and reproduction of sound. Serious-minded investigators employ devices developed primarily for the broadcasting and motion picture industry and sound recording studios. Professional equipment is expensive, and the fact that an agency may have an investment of \$25,000 or more in recording equipment denotes only the choice to have professional equipment and not the existence of some super-scientific instruments.

The deviation of the investigator's equipment from the ordinary is therefore only one of *application*. The studio recording is made under conditions that are rigorously controlled, or at least carefully surveyed and compensated. The investigator, on the other hand, is faced with a wide variety of situations over which he has no control. Therefore, the final fidelity of the recording is dependent upon the quality of the equipment used and the skill of the technician.

There are certain situations where existing equipment does not fill the need, so it is then altered or new devices are constructed. Much of the professional-type equipment can be made smaller by having it custom-built, incorporating only the functions necessary to the investigator. Many situations require that recording devices be installed in such a way as to escape discovery and to operate unattended. For obvious reasons, any excessive size which is trimmed will result in equipment more versatile and more adapted to investigators' purposes. For example, metering circuits are omitted from amplifiers, or recorders are constructed without rewind or monitor functions.

The principles underlying the more unusual electronic investigating devices are the same as in certain equipment commonly used in other endeavors. The pen register,<sup>17</sup> for example, used to record dial clicks so that the called number may be determined, is an offshoot of the telegraph code recorder. Voice relays,<sup>18</sup> which activate a recorder only when the microphone detects a sound, are used by radio operators to control their transmitters and also in paging systems. Capacity relays, which sense the presence of a person or object that moves into or away from the area near its antenna, are often employed as burglar alarms. Carrier current transmitters,<sup>19</sup> which utilize

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17. Discussed *id.* at 323-24.

18. Discussed *ibid.*

19. Discussed *id.* at 344-46.

the power lines as the means of sending signals to a receiver, are the basis of some intercommunications systems.

The most unique, however, might be the automobile trailing transmitter.<sup>20</sup> This device is essentially a small radio transmitter which either may be self-contained and operated by its own batteries or dependent upon the automobile's electrical system for power. It emits a radio signal which is received by a direction finder, and thereby enables the operator to compute by triangulation, the position and direction of the vehicle. The radiated signal may include voice information picked up by a microphone concealed within the car. Its use has not received great popularity for several reasons. It is difficult to obtain a strong radio signal from an antenna small enough to permit concealment. False bearings are received from echoes which are reflections from buildings, hills, or other projections. Small size demands low power and, when the signal is lost, it often moves out of range before it can be picked up again. The principles used here are found in aircraft and marine navigating systems and in tracking and data radiosondes carried aloft by weather balloons.

Dr. Schwartz covers the equipment and methods in a thorough and interesting manner. There is, perhaps, an excess of detail on some occasions, but this is difficult to avoid when describing a technical subject to essentially a non-technically trained audience. He mentions,<sup>21</sup> but it should be *stressed*, that the majority of recordings are made on the simplest equipment rather than by the use of highly complex apparatus. It should be remembered that much of the text covers *possible* devices and methods and not necessarily those in actual use by investigators in their routine recording procedures.

Dr. Schwartz's experiment with editing, and particularly its detection,<sup>22</sup> is something of special value. To date very little research has been performed regarding the detection of altered tapes compared with, for example, the detection of altered documents. The examination of questioned documents is a highly specialized field, and it is foreseeable that we shall have similar experts on questioned sound recordings as recordings receive more widespread recognition and use. As each typewriter possesses its own peculiar characteristics, so does each tape recorder. A number of tests may be available for determining whether a given tape came from a particular machine. In addition to the electrical wave form analysis described by Dr. Schwartz,<sup>23</sup> there is the possibility of visual inspection made

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20. Discussed briefly *id.* at 379.

21. *Id.* at 306.

22. See *id.* at 367-71.

23. *Id.* at 369-71.



by running the tape, or a copy thereof, through a suspension of carbonyl-iron in oil and viewing the resultant particle accumulation through a microscope.

All in all, to date this subject has had insufficient investigation for Dr. Schwartz to conclude that an edited tape cannot be detected.<sup>24</sup> However, to say that it can be is equally as dangerous and would be an unwarranted conclusion.<sup>25</sup>

In speculating on apparatus of the future, one is compelled to consider the seven-league strides currently being made in the physical sciences. The advancement of solid state electronic devices and their adaptation to micro-modular construction methods forecasts the existence of radically improved equipment. Much desirable apparatus is presently impractical because of its bulk. With sub-miniature components, some hardly visible to the unaided eye, and new assembly techniques, equipment will be possible that may appear fantastic to the layman by present standards. Imagine an ultra-miniature wireless microphone, powered by atomic batteries and no larger than the eraser on a lead pencil, that would operate for months unattended. Imagine also a complete recorder the size of a match box or built into a cigarette lighter. Incredible? Not so. Both are on the brink of reality.

A distinction must be made between unique and science fiction-type gadgets. Extreme miniaturization is the general trend in the electronics industry today. Development of this field has been greatly accelerated by the need for smaller and lighter instrument packages used in aircraft and missile guidance equipment and rocket and satellite telemetering and control systems. Discoveries and techniques used to this end are carried over into other phases of the electronics industry, such as investigation. The printed circuit transistor<sup>26</sup> radio is an example. On the other hand, extravagant claims are made for certain paraphernalia which contradict the laws of physics, or at least the laws of economics. An example of a device in this category is the "ultra sonic vibration detection beam,"<sup>27</sup> which supposedly can pick up a conversation in a room across the street by focusing on a wall or window. Another is the "simultaneous audio frequency, magnetic wave, detection and discrimination machine"<sup>28</sup> which enables one to overhear or record by induction a single telephone conversation from a bank of telephone booths or

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24. See *id.* at 371.

25. As I have said before, a recording is much more difficult to falsify than a photograph; sudden changes in background noise and unnatural word-emphasis are examples of sure signs that a recording had been edited. See *DASH* 367.

26. Discussed *id.* at 343-44.

27. Discussed *id.* at 353-55.

28. Discussed *id.* at 353-58.

a multiple cable. The really fantastic element about such devices is the vast amount of money that would be required for their development compared with the minute possibility existing for their success. Although the basic phenomena which inspire speculation on such apparatus may indeed exist, it is not presently possible to accept their eventual evolution into practical tools for the investigator.

#### CONCLUSION

*The Eavesdroppers* is the result of thorough research. The authors are to be commended for their interest and dedication, for without zeal and perseverance they would not have obtained the information upon which this book is based. I am confident that, as the reader of Dash's book obtains a clarification of the practices and tools now employed in investigative recordings, he will realize also that such recordings can be indispensable to the modern administration of justice when in the hands of conscientious people, whether they are enforcement officials or private investigators.

